No. 84-127 (8)

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARDSON-MERRELL INC.,

Petitioner,

v.

ANNE ELISABETH KOLLER, an infant, by and through JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, her natural guardians, JOHN LAMONT KOLLER and CYNTHIA ANNE KOLLER, individually, JAMES G. BUTLER, NICHOLAS R. ALLIS, and the law firm of BUTLER, JEFFERSON, DAN & ALLIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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RICHARDSON-MERRELL INC.,

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REPLY BRIEF FOR PETITIONER

More than half of respondents' brief ("Res. Br.") is devoted to a lengthy Counter-Statement of the Case (Res. Br. 1-26), which reargues the facts found by the District Court. However, resolution of the important legal issues presented by the petition for certiorari herein does not require this Court to engage in *de novo* reconsideration of the findings of fact made by the District Court, none of which was found to be clearly erroneous by the Court of Appeals.

Misstatements in Respondents' Counter-Statement of the Case

Respondents assert that the material facts on this appeal are "essentially undisputed" (Res. Br. 1; *see also* Res. Br. 1 n.1, 10, 24, 25 n.21, 27, 40). On the contrary, as shown in petitioner's main brief, the record presented serious issues of credibility as to the intent of both Butler and Allis, and the District Court resolved those issues adversely to respondents (Pet. Br. 7-8, 12-16). Because respondents' attempt to reargue the facts found by the District Court has no bearing on the legal issues before this Court, we have corrected the most serious misstatements in the Appendix to this reply brief.

A. The Decision of the District Court

Respondents mischaracterize the central holdings of the District Court. They argue that the District Court made no finding that Butler or Allis violated any ethical standard (Res. Br. 19, 26, 38). This argument is misleading. While the District Court did not characterize the misconduct of Butler and Allis in terms of specific Disciplinary Rules, the misconduct found by the District Court clearly established serious violations of the Code of Professional Responsibility. In the case of Butler, the District Court found a deliberate attempt to prejudice prospective jurors (Pet. App. 77a-78a), conduct which has been held to violate Canon 20 of the Canons of Professional Ethics (now Disciplinary Rule 7-107(H) of the District of Columbia Code of Professional Responsibility) at least since *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965), which was cited with approval by this Court in *Sheppard v. Maxwell*, 384

U.S. 333, 361 (1966).* In the case of Allis, the District Court found a deliberate attempt to thwart a true investigation of a crucial witness (Pet. App. 77a); such conduct has long been held to violate the basic obligations of an attorney (*see* Pet. Br. 20-21 n.*), and constitutes a violation of Disciplinary Rules 1-102 and 7-102 of the District of Columbia Code of Professional Responsibility (Pet. App. 91a, 92a-94a).**

Respondents also argue that the "linchpin" of the District Court's decision was its statement (Pet. App. 75a) that attorneys who have been admitted *pro hac vice* for purposes of a particular case may be disqualified for misconduct falling short of an ethical violation (Res. Br. 22; *see also* Res. Br. 19, 26, 38, 41). This statement has no determinative significance in this case, because the findings of the District Court clearly establish ethical violations of the first magnitude. Therefore, while petitioner believes that the Court of Appeals spoke too broadly in holding that the standard for disqualification of an attorney admitted *pro hac vice* may never differ from that for a regularly admitted attorney (Pet. App. 34a-35a), this issue need not be reached in the present case.***

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* The District Court noted that one of the responsibilities of an attorney as an officer of the Court "is to refrain from any conduct which will obstruct the administration of justice, such as the circumvention of a court's ruling on the admissibility of evidence" (Pet. App. 77a).

** Respondents correctly state (Res. Br. 1 n.*) that the text of Disciplinary Rule 7-102(B) of the District of Columbia Code of Professional Responsibility is incorrectly set forth at Pet. App. 93a-94a. Petitioner relied upon the published text of the Disciplinary Rule, which is incorrect. The error has no impact upon the issues presented by this appeal, because petitioner has not relied upon the omitted portion of Disciplinary Rule 7-102(B).

*** It is well established that admission to practice *pro hac vice* is not a right but a privilege, which rests in the sound discretion of the District Court. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 441-44 (1979); *Ross v. Reda*, 510 F.2d

Respondents argue that the District Court held that Allis had an affirmative duty to investigate possible fraud by his own client, and that he was guilty of misconduct because he failed to carry out this affirmative duty (Res. Br. 19-20, 23-24, 40-41). The Court of Appeals also adopted this interpretation of the District Court's holding (Pet. App. 41a-42a). However, it is a misreading of the opinion of the District Court. That opinion makes clear that it was respondents who argued that Allis was merely fulfilling his responsibility under the Code of Professional Responsibility to investigate Ms. Janowski's statements (Pet. App. 75a-76a). The District Court found that

1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975); *Thomas v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied*, 355 U.S. 958 (1958); *Atchison, T. & S.F. Ry. v. Jackson*, 235 F.2d 390, 393 (10th Cir. 1956); *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1205-06 (D. Colo.), *aff'd*, No. 83-1115 (10th Cir. Sept. 2, 1983), *cert. denied*, 104 S. Ct. 1907 (1984); *Silverman v. Browning*, 414 F. Supp. 80, 85-88 (D. Conn.), *aff'd*, 429 U.S. 876 (1976); *Norfolk & W. Ry. v. Beatty*, 400 F. Supp. 234, 236-38 (S.D. Ill.), *aff'd*, 423 U.S. 1009 (1975); *In re Belli*, 371 F. Supp. 111, 112 (D.D.C. 1974); *Brown v. Supreme Court*, 359 F. Supp. 549, 558-59 (E.D. Va.), *aff'd*, 414 U.S. 1034 (1973); *In re D. H. Overmyer Telecasting Co.*, 29 B.R. 647, 649 (Bkrtcy. Ct. N.D. Ohio 1983), *aff'd*, No. 83-3771 (6th Cir. Nov. 5, 1984). *But see In re Evans*, 524 F.2d 1004, 1007-08 (5th Cir. 1975); *Sanders v. Russell*, 401 F.2d 241, 244-48 (5th Cir. 1968); *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 169-71 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966), *questioned in Leis v. Flynt*, 439 U.S. 438, 442 n.4 (1979).

In light of this well-established principle, it would appear that the District Court, in exercising its discretion whether or not to invoke the remedy of disqualification, should be free to take into account the fact that an attorney has been admitted *pro hac vice*, particularly because the disciplinary measures which may otherwise represent alternatives to disqualification are likely to be less effective in the case of an attorney from another jurisdiction. No other court appears to have adopted the *per se* rule of the court below that the standard for disqualification may never be different for an attorney admitted *pro hac vice*. *Cf. Cooper v. Hutchinson*, 184 F.2d 119, 123 (3d Cir. 1950); *State v. Kavanaugh*, 52 N.J. 7, 19, 243 A.2d 225, 232, *cert. denied*, 393 U.S. 924 (1968).

the facts did not support this argument (Pet. App. 76a). The District Court did not hold, as respondents contend, that Allis was guilty of misconduct merely for failing to make a true investigation. Rather, it held that his misconduct consisted of an affirmative "attempt to thwart" such a true investigation (Pet. App. 77a).

The District Court expressly found that if Butler and Allis were disqualified, "remaining counsel can provide plaintiffs with competent counsel" (Pet. App. 78a). The Court of Appeals did not reverse or question this finding, but simply ignored it (Pet. Br. 34). Respondents argue that Butler and Allis were plaintiffs' principal trial counsel (Res. Br. 21 n.20, 28). However, respondents do not, and could not, contend that their six remaining counsel would not be competent to represent them at the trial. Two of respondents' remaining counsel, Allen T. Eaton, Esq. and George A. Kokus, Esq., are among the five lead counsel for plaintiffs in the Multidistrict proceeding in the Southern District of Ohio, which involves more than 600 Bendectin cases (*see* Pet. Br. 3 n.*).

B. The Decision of the Court of Appeals

Respondents repeatedly assert that the Court of Appeals did not modify any of the factual findings of the District Court, but instead "accepted the factual findings of the district court and relied upon additional facts that were undisputed in the record of the case" (Res. Br. 24; *see also* Res. Br. 1 n.1, 25 n.21, 27, 40). This assertion is inaccurate, as is apparent from a comparison of the opinions of the District Court and the Court of Appeals.

As to Allis, the District Court found an intent to "thwart a true investigation of a crucial witness in this

case" (Pet. App. 77a), while the Court of Appeals found that his actions "can more easily be understood to reflect a desire to get at the truth and to protect the interest of his client rather than to 'thwart a true investigation' " (Pet. App. 47a). The trial court further found that Allis intended to procure a retraction of statements already made by his secretary to the defendant (Pet. App. 76a), an issue which even the Court of Appeals admitted was disputed (Pet. App. 17a n.34), and listed four factors supporting its findings as to Allis's intent (Pet. App. 76a-77a), each of which the Court of Appeals disputed (Pet. App. 43a-48a).

As to Butler, the District Court found an intent to circumvent its orders and to prejudice the defendant (Pet. App. 78a), a finding which the Court of Appeals went out of its way to question (Pet. App. 51a). The Court of Appeals also made a *de novo* finding of absence of prejudice to the defendant (*ibid.*), despite petitioner's specific request for a remand on this issue (Pet. Br. 18-19).

ARGUMENT

POINT I

The Decision Below Wrongly Abolishes as a Matter of Law the Established Authority of the District Courts to Disqualify Counsel for Misconduct.

Respondents deny that the Court of Appeals has in effect foreclosed disqualification as a remedy for misconduct by counsel (Res. Br. 38-39). Respondents argue that the Court of Appeals held that disqualification for misconduct is permissible when (1) an attorney has violated

legal or ethical norms, *and* (2) the violation is likely to infect future proceedings (Res. Br. 27, 38-39).* This argument is inconsistent with the restrictive holding of the Court of Appeals that disqualification should be denied "[e]xcept in cases of *truly egregious misconduct* likely to infect future proceedings" (Pet. App. 38a; emphasis supplied). Respondents do not deny that, as a practical matter, this holding effectively forecloses disqualification as a remedy for misconduct.

The remedy of disqualification is long established (Pet. Br. 26). Unlike the other remedies available to the courts to deal with misconduct, it is prospective and preventive in nature, rather than retrospective and punitive (Pet. Br. 28-29). It is at once more lenient and more effective than such remedies as contempt and disbarment (Pet. Br. 28). Neither respondents nor the Court of Appeals has explained why this long-standing remedy for misconduct should be abolished.**

POINT II

The Court Below Brushed Aside the Clearly Erroneous Rule and the Abuse of Discretion Standard of Review.

A. The Clearly Erroneous Rule

Respondents argue that the Court of Appeals "was meticulous in following the 'clearly erroneous' rule

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* Even under this view of the holding of the Court of Appeals, there should at least have been a remand to the District Court for findings of fact as to whether this standard was met (Pet. Br. 30).

** Ordinarily, the question whether misconduct is "truly egregious" is within the discretion of the District Court; in this case, however, the Court of Appeals purported to hold as a matter of law that disqualification was improper (Pet. App. 56a).

throughout its opinion" (Res. Br. 40). This argument is disingenuous. The Court of Appeals gave lip service to the rule, but it departed sharply from the facts found by the District Court, although it found none of them to be clearly erroneous (*see* pp. 5-6 *supra*). The plainest proof of this is the very fact that respondents have felt compelled to argue that there were no disputed issues of material fact in this case (*see* p. 2 *supra*).

B. The Abuse of Discretion Standard

Respondents argue that the abuse of discretion standard of review was not violated because the Court of Appeals held as a matter of law that the remedy of disqualification could not be applied in this case (Res. Br. 39-40 n.31). This argument misconceives the nature of the abuse of discretion standard. The essence of the abuse of discretion standard is that the District Court has the power to choose an appropriate remedy in a particular case. *See, e.g.*, Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 761 (1982). Under the abuse of discretion standard, whether or not misconduct is "truly egregious" (Pet. App. 38a) is for the evaluation of the District Court, not the Court of Appeals. Where, as here, the appellate court forecloses a particular remedy in a particular case, the abuse of discretion standard has been abrogated.

POINT III

The Court Below Wrongly Held That an Attorney May Not Be Disqualified for Releasing Material Which Has Been Ruled Inadmissible With Intent to Circumvent the Ruling and to Prejudice an Opponent.

Respondents and the *amici* rely upon the line of cases beginning with *Bridges v. California*, 314 U.S. 252

(1941), and continuing through *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947), to *Wood v. Georgia*, 370 U.S. 375 (1962), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), for the proposition that speech concerning the administration of justice may be restricted only on the basis of a serious and imminent danger to the administration of justice (Res. Br. 48-49; Post-ACLU Br. 7-10). This argument ignores the fact that all of those cases dealt with speech by the press and other parties unconnected with the courts, and did not deal with speech about pending judicial proceedings by lawyers and other officers of the courts involved in those proceedings.* Indeed, the Court emphasized the importance of this distinction in the most recent of this line of cases, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978):

> "We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate. Cf. *Nebraska Press Assn. v. Stuart*, 427 U. S. 539, 564 (1976); *id.*, at 601 n.27 (BRENNAN, J., concurring in judgment); *Wood v. Georgia*, 370 U. S. 375, 393-394 (1962). . . ." (Footnote omitted.)

The issue posed by this argument of respondents and the *amici* has importance far beyond the confines of this case. The power of the courts to restrain the calculated use of the press to communicate with potential jurors is essential to the administration of justice. Every eviden-

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* While *Wood v. Georgia*, 370 U.S. 375 (1962), involved statements by a county sheriff, the Court emphasized that the statements were made in a private capacity. 370 U.S. at 393-94.

tiary objection that is sustained by a court restrains the speech of the lawyers directed to jurors or prospective jurors. If the First Amendment gave lawyers a right to ignore such restraints, then a whole new mode of advocacy would be created, and the traditional power of the courts to administer the rules of evidence in proceedings before them would be rendered nugatory. Counsel for the *amici* profess surprise that "every evidentiary ruling might be considered a *de facto* gag order" (Post-ACLU Br. 13). As every trial lawyer knows, this is precisely the effect of an evidentiary ruling: once the court has sustained an objection to an item of evidence, it is unprofessional for counsel to seek to evade the court's ruling by using indirect means to place the evidence before the jury. *See* DR 7-106(C). 7-108(A), (B).

Both respondents and the *amici* argue that Butler's conduct did not violate Canon 20 of the Canons of Professional Ethics, as embodied in Disciplinary Rule 7-107(H) of the District of Columbia Code of Professional Responsibility (Res. Br. 45-46; Post-ACLU Br. 14-16). This argument ignores the language of Canon 20 and its judicial interpretation. Canon 20 expressly states that "[a]n *ex parte* reference to the facts should not go beyond quotation from the records and papers on file with the court . . . ." In *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966), this Court cited with approval the holding of *State v. Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), *cert. denied*, 380 U.S. 987 (1965), that Canon 20 prohibits the divulging of prejudicial matters by a lawyer. *Cf.*, *e.g.*, *Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975).

Finally, *amici* (but not respondents) argue that if Canon 20 were to be applied to Butler's conduct, it would

be void for vagueness (Post-ACLU Br. 18-20). This argument is wholly misplaced. As the District Court found, Butler intentionally sought to circumvent the Court's orders and prejudice the jury panel (Pet. App. 77a-78a). Accordingly, application of Canon 20 to Butler raises no problem of vagueness. *See*, *e.g.*, *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982); *Parker v. Levy*, 417 U.S. 733, 755-56 (1974).

POINT IV

Attorney Disqualification Orders in Civil Cases Are Not Subject to Interlocutory Appeal Under *Flanagan v. United States*, 104 S. Ct. 1051 (1984).

Respondents have become entangled in a hopeless contradiction with respect to the question whether a showing of prejudice is required to overturn an order disqualifying an attorney in a civil case. On the one hand, respondents argue that a showing of prejudice would be required and could not be made at the end of the case, so that such an order would be effectively unreviewable on appeal from a final judgment (Res. Br. 30-31). On the other hand, respondents maintain that a showing of prejudice would not be required (Res. Br. 29, 37). Respondents do not attempt to explain how both of these propositions could possibly be true at one and the same time.

The contradictions in which respondents have become enmeshed confirm the truth of the point made in our main brief (Pet. Br. 46), that the reasoning of *Flanagan v. United States*, 104 S. Ct. 1051 (1984), applies with equal force to attorney disqualification orders in civil cases. If a

showing of prejudice is required, it cannot be made until a final judgment has been entered; while if such a showing is not required, there can be no possible contention of unreviewability on appeal from a final judgment.

Respondents argue that attorney disqualification orders in civil cases should be subject to interlocutory appeal because of the economic burden that may be imposed by such an order (Res. Br. 28, 31 n.25). But attorney disqualification orders in criminal cases may also impose an economic burden upon defendants who must hire new counsel, and who may have paid substantial retainers to their disqualified counsel. More fundamentally, considerations of economic burden do not vitiate the final judgment rule. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974), *citing Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). "If the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule." *Lusardi v. Xerox Corp.*, 747 F.2d 174, 178 (3d Cir. 1984).

Respondents argue at length that it would be impossible to show prejudice from an attorney disqualification order at the end of the case because it would be a matter of sheer speculation whether or not the disqualified attorney would have done better than the successor attorney (Res. Br. 30-31). As noted in our main brief, the same argument was made by the losing parties in *Flanagan* (Pet. Br. 47), and respondents have not shown why the argument has merit here when it did not in *Flanagan*.

Moreover, even if respondents were correct in their premise that it would sometimes (or often) be a matter of speculation whether or not a showing of prejudice could be made at the end of the case, the conclusion drawn by respondents is neither the only nor the appropriate conclusion to be drawn from this premise. Common sense would suggest that if a claim of prejudice has no basis other than speculation, there has in fact been no prejudice. *Cf., e.g., Strickland v. Washington*, 104 S. Ct. 2052, 2067-69 (1984); *United States v. Cronic*, 104 S. Ct. 2039, 2049-51 (1984). The suggestion made by some Courts of Appeals, *see, e.g., Gough v. Perkowski*, 694 F.2d 1140, 1144 (9th Cir. 1982), that after judgment a court would be required to hypothesize a reenactment of the trial to compare differences in style and judgment between attorneys, is a straw man. Prejudice is not defined by such subtle differences. The question is simply whether the party was prejudiced by inability to secure the services of an attorney of comparable standing to the disqualified attorney. This can be demonstrated by objective, not speculative, proof.

Finally, respondents argue that disqualification orders in civil cases must be subject to interlocutory appeal because, respondents contend, disqualification motions are often made for tactical reasons (Res. Br. 33-35). Respondents ask rhetorically: "Why has petitioner devoted massive and expensive resources to the time-consuming effort to have Allis and Butler disqualified?" (Res. Br. 34-35.) The answer is not, as respondents suggest (Res. Br. 35), that petitioner fears that Butler and Allis will prove effective advocates on the merits of the case. Petitioner does not share respondents' stated belief in the unique abilities of Butler and Allis (Res. Br.

21 n.20, 28). Rather, the reason why this disqualification motion has been pursued by petitioner is that, having been made the victim of deliberate unprofessional conduct by Butler and Allis, petitioner wishes to foreclose similar misconduct in the future.

Respondents' argument that disqualification motions are made for tactical reasons ignores the fact that the question before the Court involves only the appealability of disqualification motions that have been granted by the District Courts. Respondents' apparent distrust of the District Courts runs counter to this Court's teaching that the District Courts have a central role in the administration of justice in the Federal judicial system. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980); *Geders v. United States*, 425 U.S. 80, 86-87 (1976).

The trial judge has an extraordinarily difficult task. A District Judge must make many rulings before, during, and after trial. In the interests of effective administration of justice, the authority of the District Judge to make such rulings should be upheld, and the law should make clear to all concerned that the rulings the District Judge is called upon to make do, with very narrow and well defined exceptions, become the law of the case, subject only to eventual review on appeal after a final judgment has been rendered. *See, e.g., Flanagan v. United States*, 104 S. Ct. 1051, 1054 (1984). As this Court stated in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), "[p]ermitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."

CONCLUSION

For the reasons given in Points I-III above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to affirm the order appealed from. In the alternative, for the reasons given in Point IV above, the judgment of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals with directions to dismiss the appeal.

Dated: January 28, 1985

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APPENDIX

Response to Respondents' Factual Arguments

A. Butler

Respondents assert that the "only evidence" as to Butler's intent was that contained in the two affidavits submitted by Butler to the District Court (Res. Br. 18). In actuality, as set forth in petitioner's main brief, these self-serving affidavits were no more than pleadings, unsupported by evidence and untested by cross-examination (Pet. Br. 7-8). The true evidence on this issue, all of which is ignored by respondents, included the timing of Butler's disclosure on the eve of trial, the restriction of the disclosure to a single newspaper, the admission of Butler's counsel that he could not explain the timing of Butler's actions (J. A. 138-139), and the fact that Butler had previously used the press to communicate inadmissible evidence to the jury in another case (J. A. 262-267).

In the face of these undeniable facts, the bald assertions of Butler's affidavits that "there was *no* motive other than to get the drug off the market", and that his communication "was not intended in *any* way to influence *any* juror or potential juror" (J. A. 137, 250; emphasis supplied), were lacking in credibility. The District Court's finding that Butler's purpose was to circumvent the Court's preclusion orders and prejudice the defendant (Pet. App. 77a-78a) was not reversed by the Court of Appeals (*see* Pet. App. 51a), as respondents admit (Res. Br. 25 n.22). It is established for purposes of this appeal.

B. Allis

Respondents' discussion of Allis's conduct simply ignores the controlling finding of the District Court that

Allis's intent was not "to ascertain the truth" but rather "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a). Instead, respondents present a summary of Allis's own testimony concerning the reasons for his conduct, which the District Court heard and considered at length, but ultimately did not accept.

As an underpinning of their justification for Allis's conduct, respondents allege that Mrs. Koller's claim to have taken Bendectin during the critical period was corroborated by physicians' medical records (Res. Br. 1-2). In fact, there is no such corroboration for Mrs. Koller's claim.* The only medical record as to drugs taken during the critical period fails to mention Bendectin at all.** The other records of Walter Reed Army Medical Center which could indicate whether or not Mrs. Koller took Bendectin during the critical period inexplicably disappeared after Mrs. Koller failed to find an early prescription (C.A. App. 1105, 1107, 1182-1187, 1189-1191, 1195-1197).***

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* In support of their allegation, respondents cite two medical records, one of which states that Mrs. Koller was taking Bendectin on November 20, 1978, almost a month after the critical period defined by respondents ended on or about October 23, 1978 (J. A. 147), while the other states that Mrs. Koller took Bendectin during the "1st trimester" (J. A. 149), which does not establish that Bendectin was taken during the critical period early in the first trimester.

** This record is a form filled out by Mrs. Koller when applying for obstetrical care on October 25, 1978, about two days after the end of the critical period defined by respondents (J. A. 144-145). The form inquired in two places as to medications taken since the last menstrual period (J. A. 144, Questions 11, 16). Mrs. Koller left both spaces blank (*ibid.*).

*** Mrs. Koller has given widely varying testimony as to how and when she first took Bendectin during her pregnancy with Anne Koller (C.A. App. 1140-1141, 1143-1144, 1151-1158, 1193-1194, 1198). Her husband has likewise changed his testimony on this subject (C.A. App. 1201-1223, 1235). Relatives and close associates of Mrs. Koller recall that Mrs. Koller was nauseated during the critical period of her pregnancy with Anne Koller, but do not recall her taking Bendectin or any other drug to alleviate her nausea during this period (C.A. App. 1259-1266, 1262-1263, 1266, 1269, 1271).

Respondents assert that "[u]nbeknownst to Allis, his secretary had been in regular contact with representatives of petitioner's counsel during the preceding four days" (Res. Br. 2).* In fact, as shown in petitioner's main brief, the credible evidence established that Allis knew on December 27, 1982 that Ms. Janowski had told defense counsel that the case was fraudulent (Pet. Br. 12), and the District Court found that the primary if not the sole reason for Allis's conduct on that date was to obtain a retraction of Ms. Janowski's statements to defense counsel (Pet. App. 76a).

Similarly, respondents allege that Allis "was concerned that petitioner was engaging in improper conduct, and he wished to get to the bottom of it to protect his clients' interests" (Res. Br. 3). The District Court made an entirely different finding as to Allis's purpose: "to thwart a true investigation of a crucial witness in this case in pursuit of protecting the interests of his clients" (Pet. App. 77a).

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* Contrary to respondents' suggestion (Res. Br. 2 n.2), the representatives of defendant who contacted Ms. Janowski during this period only attempted to locate her and verify her identity, and sought to avoid substantive discussions until Ms. Janowski had consulted independent counsel (Barnes 1/26/83 Dep. II-5-II-6, II-26; C.A. App. 1298-1299, 1303, 1325, 1332). Only after Ms. Janowski subsequently indicated that she would not consult Mr. Schuck, after the Butler firm took a statement from her, and after the Butler firm waived the attorney-client privilege did defendant attempt to take a statement (J. A. 23-27; Ryan 2/26/83 Dep. 141, 210, 260).

Similarly, although respondents allege that defense counsel made an *ex parte* communication to the District Court (Res. Br. 2-3), what in fact occurred was that defense counsel attempted to arrange for a conference with the Court, but were told by the District Court's law clerk that the Court was in recess until December 27, 1982 (J. A. 21, 94-95).

Respondents quote what purport to be representative excerpts from the tape recording made by Allis and Humphries on the evening of December 27, 1982 (Res. Br. 5-6). Respondents ignore the key portion of the tape recording, described in petitioner's main brief, in which Allis pulled out the statement he had prepared for Ms. Janowski to sign (Pet. Br. 14).*

Respondents attempt to palliate Allis's conduct by attacking that of others. They impugn the independence of Ms. Janowski's counsel, Carl J. Schuck, Esq. (Res. Br. 9 n.9), although the record shows that Mr. Schuck had no previous acquaintance with defense counsel and was recommended by Leonard S. Janofsky, Esq., a former President of the American Bar Association (J. A. 31). Respondents describe certain payments made at Mr. Schuck's instance to defray medical and living expenses of Ms. Janowski and legal expenses of her roommate (Res. Br. 12-13), without mentioning that it was Mr. Schuck who concluded that these payments were necessary to sustain Ms. Janowski and her premature infant until she could find new work, and who suggested that they should be divided between the parties, a suggestion which respondents rejected (J. A. 75-79). Finally, respondents argue in a footnote that defense counsel were or may have been guilty of unethical conduct (Res. Br. 14 n.13), without attempting to explain their failure to put these allegations to the test by making a motion in the District Court (*see* Pet. Br. 17-18 n.*).

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* Respondents also allude (Res. Br. 7-8 n.7) to a sheet on which Ms. Janowski had written out a purported conversation with Mrs. Koller (J. A. 28), without mentioning that Ms. Janowski afterwards testified under oath that she had in fact had such a conversation with Mrs. Koller (J. A. 52-53).

Respondents attack Ms. Janowski's credibility in a lengthy footnote which is riddled with inaccuracies (Res. Br. 11-12 n.10). These inaccuracies need not be detailed here, because, as the District Court stated, the issue before it was "not whether Krystyna Janowski is a credible witness or not, but whether or not whatever Krystyna Janowski knows or does not know plaintiffs have tried to keep from me" (J. A. 164). After hearing solely witnesses identified with the respondents, called by petitioner as adverse witnesses, the District Court concluded that this was what Allis had tried to do (Pet. App. 75a-77a).

Respondents' brief stresses the six character witnesses who appeared on behalf of Allis (Res. Br. 14), without mentioning that three of them, including Judge Van Dusen and Attorney General Van de Kamp, admitted that their opinion of Allis would be affected if the facts set forth in the District Court's order to show cause were accurate (C.A. App. 857-858, 862-863, 871). Similarly, respondents rely upon the testimony of two experts in legal ethics (Res. Br. 14) without disclosing that both of them testified that if the facts outlined in the order to show cause were assumed to be accurate, they would conclude that Allis's conduct violated the Code of Professional Responsibility (J. A. 312-313, 321-322). Indeed, the District Court rejected the opinions of the expert witnesses because they were unsupported by "the totality of the evidence" (Pet. App. 76a).

Thus respondents' effort to reargue the facts as to the conduct of Allis is flatly inconsistent with the express findings of the District Court.